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STATUTES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 234

MISSISSIPPI PUBLISHING CORPORATION,
Petitioner,

vs.

DENNIS MURPHREE,
Respondent.

PETITIONER'S REPLY BRIEF

I

The Opinion of the Circuit Court of Appeals in This Case Is Contrary to the Opinion of Other Circuits

At page 26 in original Brief for Petitioner we cited several cases from which it necessarily appears that the decision of the United States Circuit Court of Appeals in this case is contrary to the decision of other Circuits on the same matter.

Counsel has not properly distinguished *Contracting Division A. C. Horne Corp.* v. *New York Life Insurance Company*, 113 Fed. (2d) 864. In that case the Research Laboratories, Inc., referred to as the Research, and the Contracting Division A. C. Horne Corp. residing in the Eastern

District of the State of New York. The former was the owner of a patent of which the latter was licensee. The Contracting Division Corporation filed suit in the Southern District of New York against the New York Life Insurance Company for an infringement of the patent. The New York Life Insurance Co. wished to have the Research Corporation a party plaintiff so that it might file a counterclaim against each of said corporations.

It made application under Federal Rules of Civil Procedure 13(b), 19(a) and Rule 21 to that end. In order, however, to maintain a counterclaim against the Research Corporation, it was necessary that process issue from the Southern District of New York to the Eastern District of New York; and since neither of these corporations were incorporated or had offices in the Southern District the appellant would be unable to get process to issue on its application to require both corporations to join as plaintiff. Rule 4(f), therefore, was directly involved and the decision is in conflict with the present case.

The Court cites the case of *Gibbs* v. *Emerson Electric Manufacturing Co.*, D. C. Mo., 29 F. Supp. 810, where the same effort was made, and the Court based its conclusion on a construction of Rule 4(f) in connection with Rule 82. The Court used the following language:

> "The statute is quite specific upon this subject. Section 109, Title 28 U. S. C., 28 U. S. C. A., Section 109, undertakes to fix the venue for suits in patent cases. Venue can only be had for the infringement of letters patent 'in the district of which the defendant is an inhabitant, or in any district in which the defendant * * * shall have committed acts of infringement and have a regular and established place of business.'
>
> "It appears conclusively that the defendant Emerson Electric Manufacturing Company is not an inhabit-

ant of the district, and has no regular and established place of business within the district.

"Rule 4(f) of the Rules of Civil Procedure permits the service of process 'anywhere within the territorial limits of the state in which the district court is held.' This liberal rule applies only where the venue will permit.

"Rule 82 specifically provides that the rules of Civil Procedure 'shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.' "

The Court likewise cited *Melekov* v. *Collins*, D. C. Calif., 30 Fed. Supp. 159, where the Court held that Rule 4(f) and Rule 82, Rules of Civil Procedure, must be construed together and that process could not issue for a defendant in another district unless territorial jurisdiction was present in the Court from which the process was to issue. The Court used the following language:

"Congress has in clear language defined the limits of the rule making power of the Court in the enabling act of June 19, 1934, c. 651, Section 1, 48 Stat. 1064, Title 28 U. S. C. A. Section 723b. This statute in its applicable part is as follows:

" 'The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States * * * the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take the effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.'

"It is obvious that the only legislative authorization to establish rules to govern civil cases is such as provides solely for adjective matters in the course of litigation in controversies of a civil nature, as distinguished

from substantive ones. The latter are to remain secure to all litigants. Undoubtedly Congress can enlarge the power of the district courts to send their process for service outside of the district. As far as we are informed it has not done so in actions like the one before us, except in the restrictive way of keeping unimpaired historical substantive rights which are claimed by litigants. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684.

"In my opinion, Rule 4(f) ex proprio vigore could not, even if there did not exist in the Federal Rules of Civil Procedure a correlative requirement, operate to compel the nonresident defendant Vaught to submit personally to the jurisdiction of this district court in the case at bar. This rule is necessarily and expressly limited in its scope by act of Congress.

"But the limitations of the scope of Rule 4(f) are not entirely dependent upon the statute which we characterize as the enabling act, supra.

"Rule 82, which is as much a part of the scheme of the modernized procedure in civil actions in the federal courts as Rule 4(f), is a definite statement that the long-established and well-settled principles of substantive rights of civil litigants remain intact. Rule 82 is as follows:

"'Rule 82. Jurisdiction and Venue Unaffected.

"'These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.'

"In Sewchulis v. Lehigh Valley Coal Co., 233 F. 422, the Second Circuit Court of Appeals aptly differentiates between the method of serving summons and the effect of such service when made, and shows that the latter activity is one which extends the jurisdiction of the District Court of the United States. Judge Hough, writing for the court, said:

"'But there is a wide difference between the method of serving a summons and the effect of such service

when made. The first relates to the 'form, manner, and order of conducting and carrying on suits.' The effect of the formal act called 'service' is not a question of practice at all, but one of jurisdiction, and jurisdiction in turn must be tested by substantive law.' "

Therefore, it is apparent that the Circuit Court of Appeals for the Second Circuit in the case of *Contracting Division* v. *New York Life Insurance Co.* denied the motion to permit counterclaim to be filed because of the inability of the defendant to procure process on the corporations, domiciled in the Eastern District of New York. The case is directly in point and in conflict with the present decision.

II

In the Brief of Respondent's Counsel No Case Is Cited Holding That a Foreign Corporation May Be Sued in a District Other Than That in Which It Transacted Business, Whether Suit Is by a Resident or a Nonresident of the State.

In the case of *St. Louis S. W. Railway Company* v. *Alexander*, 227 U. S. 218, 57 L. Ed. 486, the Court announced the following rule:

"The other question as to the presence of the corporation within the jurisdiction of the court in which it was sued raises more difficulty. A long line of decisions in this court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof. Lafayette Ins. Co. v. Frence, 18 How. 404, 15 L. Ed. 451; St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 222, 1 Sup. Ct. Rep. 354; Goldey v. Morning News, 156 U. S. 518, 39 L. Ed. 517, 15 Sup. Ct. Rep. 559; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47

L. Ed. 1113, 23 Sup. Ct. Rep. 728; Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. Ed. 1122, 23 Sup. Ct. Rep. 807; Peterson v. Chicago, R. I. & P. R. Co., 205 U. S. 364, 51 L. Ed. 84, 27 Sup. Ct. Rep. 513; Green v. Chicago, B. & Q. R. Co., 205 U. S. 530, 51 L. Ed. 916, 27 Sup. Ct. Rep. 595; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. Ed. 272, 30 Sup. Ct. Rep. 125; Herndon-Carter Co. v. James N. Norris Son & Co., 224 U. S. 496, 56 L. Ed. 857, 32 Sup. Ct. Rep. 550."

The foregoing case states the general rule which has uniformly prevailed in the determining of the question of venue as to foreign corporations in the Federal Courts of the United States. Other cases are cited in our original brief at page 25.

Opposing counsel dismissed the entire argument with the mere statement that all of these cases were decided prior to the adoption of Rule 4(f), Rules of Civil Procedure. Counsel do not cite a single case holding that a foreign corporation transacting business in only one district in the state may be sued either by a resident or nonresident of the state in a district other than that in which it transacts business. In the case of Schwarz v. Arteraft Silk Hosiery Mill, 110 F. (2d), 465. The plaintiff, a resident of the Southern District of New York, filed suit against a foreign corporation transacting business in such district and an individual resident of Pennsylvania, present and served within the district. The controversy arose over the contention of the defendant that he was fraudulently lured into the district and was not subject to process.

In the case of Williams v. James, D. C. La. 34 Fed. Supp. 61, suit was brought by nonresidents of the State of Louisiana in the Western Division thereof, against a nonresident of the state transacting business in the Western District and an insurance corporation transacting business throughout the entire state. Each of the defendants had appointed

an agent for service of process residing in the Eastern District and the Court held that process might issue from the Western District to the Eastern District.

In the case of *Coastal Club* v. *Shell Oil Company*, 45 Fed. Supp. 850, the suit was brought in the Western District of Louisiana by a resident of the district against the Shell Oil Company, a foreign corporation, actually engaged in drilling oil wells in the Western District of the state within the jurisdiction of the Court. Its agent for service of process, however, resided in the Eastern District and the Court held that properly that process might issue to the Eastern District for service. Counsel are constantly confusing the question of the place of service with venue. The rule is that the Court having jurisdiction and the venue being properly laid under Rule 4(f) process may issue to any part of the state for service.

Counsel cite the case of *McCormick* v. *Walthers*, 134 U. S. 41, 33 L. Ed. 833. We distinguished this case in our original Brief at page 27, reference to which is made.

We likewise distinguished the case of *Munter* v. *Weil Co.*, 261 U. S. 276 at page 27, and at the same point we distinguished the case of *Seaboard Rice Milling Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 270 U. S. 363.

At page 28 we distinguished the case of *Mass. Bonding and Insurance Co.* v. *Concrete Steel Bridge Co.*, 37 Fed. (2d) 696.

In the case of *Andrews* v. *Joseph Cohen & Sons*, 45 F. Supp. 732, it is held that a foreign corporation could only be sued in the Southern District of Texas where it was transacting business and the wrong complained of took place. Counsel are very unfortunate in their citation in the case of *Richard* v. *Franklin County Distilling Co.*, 38 Fed. Supp. 513. In that case a resident of the State of Kentucky filed suit in the Western District thereof against a foreign corporation doing business only in the Eastern

District of Kentucky. The District Judge held that since the foreign corporation was not doing business within the Western District of Kentucky process could not issue under Rule 4(f) to the Eastern District for service on the defendant. In the opinion delivered by Judge Miller will be found a learned and interesting discussion of the question wherein the Court held that Rule 4(f) must be held in connection with Rule 82, and that process may not issue to another district for a foreign corporation not residing or an inhabitant of the district in which the suit is brought. In view, however, of the importance of the question the Court states that the matter should be authoritatively passed upon, using the following language:

> "Plaintiff therefore contends that Rule 4(f) is a statutory enactment and therefore supercedes the earlier rule established by the case above referred to. I agree that Rule 4(f) has the effect of a statutory enactment, but this also means that Rule 82 likewise, has the effect of a statutory enactment. Accordingly, the question still remains for decision as to the combined effect of both Rules 4(f) and 82. This question will no doubt repeat itself often and it is hoped that it will be ruled upon by one of the higher courts in the near future, as it should be applied uniformly throughout the federal courts. In the absence of any such ruling at the present time, and in view of conflicting decisions from District Courts, I see no reason to depart from my former holding in Carby v. Greco, supra."

Counsel cite the case of *O'Leary* v. *Lofton*, D. C. N. Y., 3 F. R. D. 36. In that case a resident of the Eastern District of New York filed suit in such district against a foreign corporation organized under the laws of Florida doing business in the Southern District. The District Judge conceded that this Court had never passed upon the question; that no Circuit Court of Appeals had done so. The District Judge further conceded that opinions of other District

Courts outside of New York were to the contrary; that the decision of the District Judges in New York was divided, but held that since it was only a ten-minute ride from the Eastern District to the Southern District, on the streetcar, that the matter was one of procedure and not of substance. The decision in this case emphasizes the importance that this Court take jurisdiction and settle the question.

We respectfully submit that the rule was most clearly and accurately stated by Judge Charles E. Clark, of the Second Circuit, who was reporter for the rules having in charge the adoption thereof. His statement found in Moore's Federal Practice. Supplement to page 361 is in the following language:

> "Dean, now Circuit Judge, Charles E. Clark, Reporter for the Supreme Court's Advisory Committee, said in reference to Rule 4(f): 'The question has been raised whether this is not a substantive change, one affecting jurisdiction and venue. I might say on that, it is our theory that definitely it is not. This is not a matter of either the jurisdiction of the court, what matters the court shall hear and decide, or of the venue, which is the place where certain kinds of action shall be tried. This affects neither one of those points. It simply says that in cases where the district court already has jurisdiction and venue its process may reach as far as the confines of that state itself. In other words, that is why we consider it procedural. It is simply allowing people to be brought before the court within the entire state and not merely within one district.' Proceedings before the Cleveland Institute on the Federal Rules (1938 205-206)."

III

The Petitioner Is a Resident and Inhabitant of the Southern District of Mississippi

Section 112, 28 U. S. C. A., paragraph (a) provides that no civil suit shall be brought in any district court against

any person by any original process or proceeding in any other district than that whereof he is an inhabitant. This section deals primarily with states having but one judicial district. In states where there are two judicial districts, Section 113 contains the following provision:

> "When a state contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides;"

It is perfectly obvious that the word "inhabitant" in Section 112 and the word "resident" in Section 113 are synonymous. It is very true that Section 112 contains the following provision:

> "but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the resident of either the plaintiff or the defendant."

And it may be conceded that the foregoing provision is applicable to Section 113. This provision, however, does not enlarge, but restricts the jurisdiction of the Court.

In the case of *Shaw* v. *Quincy Mining Company*, 145 U. S. 444, the Court used the following language:

> "The whole purport and effect of that Act was not to enlarge, but to restrict and distribute jurisdiction."

The same rule is announced in *McCormick* v. *Walthers*, 134 U. S. 41. However, if the suit should be brought by a citizen of the state against a foreign corporation or brought by a nonresident of the state against a foreign corporation the same must, of necessity, be filed in the district where the foreign corporation transacts its business. However, as was held in the case of *Neirbo* v. *Bethlehem Shipbuilding Corp.* and the *Oklahoma Packing Company* v. *Oklahoma Gas and Electric Company* where a corporation en-

ters into a state and appoints an agent for service of process consenting that it may be sued in the state it becomes from all purposes of venue an inhabitant and resident of the district in which it transacts business. In the *Neirbo* case the plaintiff was a nonresident of the state as was the Bethlehem Shipbuilding Corp., but the latter by appointing an agent for service of process had waived its right to be sued by a nonresident only at the place of its incorporation and had consented to be sued before any court, state or federal, having jurisdiction where the venue was properly laid.

In the *Neirbo* case the plaintiff could only have sued the foreign corporation in a district where it was transacting business and if the suit had been brought by a resident of the state, the rule would have been the same.

For all practical purposes the Petitioner is a resident and an inhabitant of the Southern District of Mississippi. It is still a Delaware Corporation with the right to remove a case to the Federal Court where the requisite facts exist, but as to the question of venue it has waived its right to be sued by a nonresident only in the state of its creation and may be sued in the district, and only in the district, where it transacts business.

IV

We Do Not Question the Validity of the Rules of Civil Procedure for Use in the District Courts of the United States

We do not question the validity of the Rules, but we submit that the rules should be construed together as a harmonious whole; and no rule should be construed as to violate the Act of Congress authorizing the adoption of the rule. The construction of Rule 4(f) adopted by the Court

of Appeals in this case fails to take into account Rule 82, and authorizes the Respondent, assuming that he is a citizen of the state, to maintain a suit against a foreign corporation not transacting business in the district. It is our contention that the rule may not legally have any such effect. Rule 82 shall not enlarge or diminish jurisdiction or venue. This means that the rule shall not enlarge jurisdiction over the person; that is to say, shall not enlarge territorial jurisdiction over the petitioner. The manner of obtaining service and the place of service is a matter of procedure, but the Petitioner has the right to be sued in the manner and at the place provided by federal statutes. It has not waived this right. This right is a matter of substance and not merely one of procedure. It is a right which the Petitioner may waive, but which the Petitioner has not waived. It is insisting upon this substantial right.

In the case of *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 69 L. Ed. 1119 this Court laid great emphasis upon the importance that suit be filed at the place provided by the Act of Congress. The Court used the following language:

> "We are of the opinion that by the phrase 'any district court of the United States' Congress meant any such court 'of competent jurisdiction.' The phrase 'any court' is frequently used in the Federal statutes, and has been interpreted under similar circumstances as meaning 'any court of competent jurisdiction.' By the general rule the jurisdiction of a district court in personam has been limited to the district of which the defendant is an inhabitant, or in which he can be found. It would be an extraordinary thing if, while guarding so carefully all departure from the general rule, Congress had conferred the exceptional power here invoked upon a board whose functions are purely advisory (Pennsylvania R. Co. *v.* United States R. Labor Bd., 261 U. S. 72, 67 L. Ed. 536, 43 Sup. Ct. Rep. 278;

> Pennsylvania R. System *v.* Pennsylvania R. Co., March 2, 1925 (267 U. S. 203, ante, 574, 45 Sup. Ct. Rep. 307), and which enters the district court, not to enforce a substantive right, but in an auxiliary proceeding to secure evidence from one who may be a stranger to the matter with which the board is dealing."

The Petitioner in entering the State of Mississippi for the purpose of transacting business in the Southern District thereof, appointed an agent for service of process. It surrendered a valuable right, the right to be sued by a nonresident in the state of its creation, but it only agreed that suit might be filed for some court having jurisdiction where the venue was properly laid. In the federal court that suit must be brought in a district of which it is a resident and inhabitant; that is to say, in the Southern District of Mississippi. In a state court it may be sued in the county where it has its principal office and place of business and in the county where the cause of action accrued.

Forman v. *Mississippi Publishers Corp.*, 14 So. 2d, 344; *Sanford* v. *Dixie Construction Co.*, 137 Miss. 627; *Tri-State Transit Co.* v. *Mundy*, 194 Miss. 714. In the state court it may be sued at two places, and if the suit is brought in a county other than that in which the agent for service of process resides such process may be issued to the proper county. Neither venue nor jurisdiction turn upon the place of service of process as counsel so often insist.

V

The Respondent Was a Resident of the Southern District of Mississippi

Counsel cite *Hallenbeck* v. *Leimert*, 294 U. S. 699, 79 L. Ed. 1236. This case has no possible connection and throws no light upon this case.

The Petitioner had no right to appeal and was not required to appeal from the conclusion of the District Judge that the plaintiff resides in the Northern District of Mississippi. The judgment of the court, the thing appealed from, was in favor of the Petitioner and it could not appeal therefrom. It was not required to note any exception to any statement made by the District Judge.

We respectfully submit that the writ should be granted, the case determined by this Court, the judgment of the Court of Appeals reversed, and the Judgment of the District Court affirmed.

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